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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 JODY KRISS and MICHAEL "CHUDI"
EJEKAM, et al.,

4 Plaintiffs,

5 v.

10 CV 3959 (LGS) (FM)

6 BAYROCK GROUP LLC, et al.,

7 Defendants.

-----x

8 JODY KRISS, et al.,

9 Plaintiffs,

10 v.

13 CV 3905 (LGS) (FM)

11 BAYROCK GROUP LLC, et al.,

12 Defendants.

-----x

13 New York, N.Y.
14 April 14, 2015
11:45 a.m.

15 Before:

16 HON. FRANK MAAS,

17 Magistrate Judge

18 APPEARANCES

19
20 FREDERICK M. OBERLANDER

Prior Attorneys for Plaintiffs Kriss and Ejekam

21 -and-

22 RICHARD E. LERNER

23 SIMON & PARTNERS, LLP

Attorney for Plaintiffs Kriss and Ejekam

24 BRADLEY D. SIMON

25 (Continued)

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APPEARANCES

BEYS LISTON MOBARGHA & BERLAND, LLP

Attorneys for Defendants Felix Sater and Salvatore Lauria

MICHAEL P. BEYS

NADER MOBARGHA

SATTERLEE STEPHENS BURKE & BURKE, LLP

Attorney for Defendants Bayrock Group LLC, Bayrock Spring

Street LLC, Bayrock Whitestone LLC, Bayrock Camelback LLC,

and Bayrock Merrimac LLC

WALTER SAURACK

MOSES & SINGER

Attorney for Defendant Felix Sater

ROBERT WOLF

ALSO PRESENT: FELIX SATER

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(Case called)

MR. SIMON: Good morning, your Honor. Bradley Simon, and I'm replacement counsel for Kriss and Ejekam.

MR. OBERLANDER: Good morning, your Honor. Frederick Oberlander, prior counsel until somebody signs an order of replacement.

MR. LERNER: Of-counsel to Mr. Oberlander, I'm Richard Lerner.

MR. SAURACK: Walt Saurack on behalf of defendant Bayrock.

MR. BEYS: Michael Beys on behalf of defendant Felix Sater, on behalf of defendant Sal Lauria; and as to Kriss II, 13 CV 3905, counsel for myself individually, for my partner Nader Mobargha, who is also with me as counsel for all defendants, and for our firm, which was, at the time of Kriss II, named Beys Stein & Mobargha.

MR. WOLF: Good morning, your Honor. Robert Wolf representing Felix Sater. I'd like to indicate that my client Mr. Sater is present in court sitting behind Mr. Beys.

THE COURT: Let me start with the issue that was raised in some of the letters which is focusing first on the 2010 action. You indicated, Mr. Simon, that you're replacement counsel. Is that for all purposes in the 2010 action? The letter Mr. Oberlander sent had an ambiguity in it.

MR. SIMON: For all purposes with respect to Mr. Kriss

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1 and Mr. Ejekam. Mr. Oberlander indicated he has some perhaps
2 derivative clients, so I'm not quite sure.

3 THE COURT: Yes. That's what I was trying to get to.

4 MR. SIMON: Right.

5 THE COURT: It seems to me you can't have -- let me
6 ask Mr. Oberlander.

7 MR. OBERLANDER: To be honest, this is a gray area,
8 and I just wanted to protect everyone's interests. I have
9 signed the substitution form ten days ago to substitute
10 Mr. Simon for myself consensually. It didn't get filed I think
11 because of your order that came down that said don't file
12 anymore papers. But in consultation with all the other lawyers
13 on this, there's a great body of law, most of it in the Second
14 Circuit, that goes back decades having to do with in the class
15 action area under 23 what's required to replace counsel.

16 THE COURT: The 2010 case isn't the class action.

17 MR. OBERLANDER: I understand that, but there is very
18 little law on what's required to replace counsel of a
19 derivative one. All I wanted to do was make certain that the
20 Court approves my withdrawal and nobody winds up later in that
21 group of people, whatever you call the group that's
22 derivatively represented equitably in a derivative matter, I
23 don't want any of them to say you didn't get leave of Court to
24 withdraw it. I just put it there so that I assumed that the
25 Court would be happy to issue an order that I'm substituted for

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1 all purposes. It was merely to protect them; that's all.

2 THE COURT: We have talked about you individually, but
3 are you and Mr. Lerner a package in terms of that?

4 MR. OBERLANDER: I speak for him, yes. We're a
5 package. I didn't mean to interrupt you.

6 THE COURT: That's okay.

7 MR. OBERLANDER: To save time, since we did all the
8 research, the issue on a class matter is that prior to
9 certification, it appears that substitution can be done at the
10 request and consent of counsel and lead plaintiff. I didn't
11 mean to throw sand in the wheels. We could have handled this
12 by letter except that you said don't file anymore papers.

13 THE COURT: As far as I'm concerned, you and
14 Mr. Lerner are relieved for all purposes in the 2010 action,
15 and I will enter a written order to that effect.

16 MR. OBERLANDER: Thank you, your Honor.

17 MR. BEYS: We would ask you to note our objection, I
18 can make a fuller record on that, but I don't think they should
19 be allowed out given the five-year procedural history of this
20 case and given whatever liability they may have incurred both
21 as attorneys and on behalf of Messrs. Kriss and Ejekam.

22 THE COURT: But that's I think a separate issue. To
23 the extent that Mr. Kriss or Mr. Ejekam have incurred some
24 liability, I suppose that could be the subject matter of some
25 other suit; to the extent that Mr. Lerner or Mr. Oberlander

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1 have exposed themselves to some liability, I think the same
2 pertains or perhaps there would be some grievance or
3 disciplinary committee action. But I don't know that that's a
4 basis for me turning to Mr. Kriss and Mr. Ejekam who wish to
5 substitute counsel at a stage where we don't even have a final
6 pleading, much less discovery underway. It seems to me I'm not
7 precluding relief by saying that Mr. Simon is the new sheriff.

8 MR. BEYS: Including under Rule 11, your Honor?

9 THE COURT: Well, for things that occurred heretofore,
10 I certainly haven't researched that, but I'd be surprised if
11 under Rule 11 or the Court's inherent authority I couldn't deal
12 with matters that occurred before Mr. Oberlander was relieved.
13 That would make no sense. Any lawyer who was in trouble in a
14 case could then bail out of the case and put himself or herself
15 beyond the jurisdiction of the Court in the context of the
16 case.

17 Mr. Oberlander.

18 MR. OBERLANDER: Without commenting on inherent
19 powers, Rule 11 is bifurcated. Generally, it's used at the
20 request of one of the parties by serving notice, and then
21 there's a 21-day cure period. A court can activate it *sua*
22 *sponte*, but when it does, since there's no cure period, it
23 becomes quasi criminal with substantial due process.

24 My point is, as to the Rule 11, whatever can be done,
25 it can't be done by a party once we're out because we wouldn't

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1 have the right to withdraw anything within 21 days.

2 THE COURT: I think you may be agreeing with me.
3 Certainly the Court, if it felt that it was appropriate, could
4 impose sanctions, notwithstanding the fact that you have
5 withdrawn from the case if it were appropriate.

6 MR. OBERLANDER: My concern is not with what the
7 Court's powers are. They are awesome. My concern is what
8 theirs are, which are zero once we're out, because, otherwise,
9 we wouldn't have the ability to withdraw the offending paper.
10 Rule 11 specifically refers to a paper in the secure period.

11 THE COURT: We needn't resolve that issue today. As
12 far as I'm concerned, I will enter an order indicating that
13 Messrs. Oberlander and Lerner are no longer counsel to Kriss
14 and Ejekam in the 2010 matter, and Mr. Simon is.

15 MR. OBERLANDER: Thank you.

16 MR. SAURACK: If I could speak. I know you relieved
17 counsel with conditions to be imposed, and we have an
18 application still pending before the Court for the return of
19 our documents.

20 THE COURT: Let's deal with that a little later on.

21 MR. SAURACK: No problem. My only point was, we'd
22 like counsel to remain under the Court's jurisdiction while
23 that aspect of the case is resolved.

24 THE COURT: Counsel are Officers of the Court, and I
25 don't see that as an issue. I want to address the documents,

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1 but before I do that, I want to get some understanding of who,
2 if anybody, purports to represent somebody in the 2013 case.

3 MR. WOLF: Your Honor, if I may be heard on the order
4 you're issuing now.

5 THE COURT: Yes, Mr. Wolf.

6 MR. WOLF: Our only issue with the substitution of
7 counsel, one set of counsel being relieved and another attorney
8 coming in, is that it be conditional at this point on the new
9 counsel coming in not seeking extensions of time that otherwise
10 would never be granted; in particular, as he indicates in his
11 letter, he mentions a second amended complaint. The amended
12 complaint process, in most cases you can say it's been years
13 and it's a figure of speech. It's not a figure of speech.
14 It's been a torturous reality to my client Mr. Sater whose name
15 has been dragged in the mud for five years on this case. And
16 they have deliberately not even served ten or more defendants
17 just to keep a case pending so that it can be used as a vehicle
18 of abuse.

19 My only concern is that whatever's been filed and
20 whatever needs to be sanitized per the Court's order, that's
21 the operative complaint going forward and there will not be any
22 other amendments or applications from them.

23 THE COURT: When I turn to Mr. Simon, I'll see what he
24 has in mind; then, frankly, I'll hear you and decide whether
25 what he suggests makes sense. But let me please first turn to

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1 the 2013 action and first understand, Mr. Simon, whether you
2 have any role in that case.

3 MR. SIMON: Are you referring, your Honor, to the case
4 that's commonly known as the Kriss II litigation?

5 THE COURT: Yes.

6 MR. SIMON: Mr. Kriss and Mr. Ejekam have conveyed to
7 me that they wish to dismiss that action with respect to
8 themselves. I understand Mr. Oberlander has other parties that
9 he represents, but they don't wish to proceed with that case
10 any longer.

11 THE COURT: And 2013 is a putative class action,
12 correct, Mr. Oberlander?

13 MR. OBERLANDER: Yes, but one of my clients remains
14 alive; one is an entity; and the other two have recently passed
15 and speak through their estate attorneys and the
16 administrators. And I have to check with them to see whether
17 they wish to continue on as a representative as opposed to in
18 an individual capacity, all right? So I understand the
19 question, I certainly do, which is, is the case continuing with
20 them; and, if so, solely individually or will they attempt to
21 be representatives under Rule 23?

22 I asked for a short period, given it's also just the
23 end of Passover and the surviving client is a rabbi in Israel,
24 I'm going to need about a week to resolve that and answer the
25 Court.

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1 THE COURT: I don't have a problem with that. I just
2 want to make sure I understand this. There's one breathing
3 plaintiff, who potentially is still in the case, but I thought
4 I heard you say you also represent the entity. Maybe I
5 misunderstood you.

6 MR. OBERLANDER: No, you didn't, and I apologize for
7 confusing you. What happened is, I had three clients, two of
8 them passed within the past couple of years, and the case is
9 written in the names of their estates. As to the two deceased
10 people, the estates will continue as personal representatives.
11 The third one remains alive, he lives in Israel but is
12 certainly capable of doing things. And the fourth one is an
13 entity.

14 I have never discussed with them, to be honest with
15 the Court, whether or not they would consider and wish to
16 attempt to be class representatives. So I'm asking the Court
17 for a little time so that I may intelligently correspond with
18 them and say what would you like to do here.

19 May I just have another minute.

20 THE COURT: Let me just ask one thing: Is it correct
21 that the 2013 complaint seeks monetary relief under the Crime
22 Victims Compensation Act?

23 Is that the gist of it?

24 MR. OBERLANDER: I really apologize. I know that it
25 appears to be a simple question. It's not. I'll make it as

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1 simple as I can, all right?

2 The CVRA itself is inherently ambiguous as to venue
3 and what's proper when a case is closed; it just is.
4 Therefore, whether it does nominally or not, it does seek
5 damages -- I'm going to explain it, believe me, it's extremely
6 painless, but I'm thinking on my feet, all right?

7 Kriss I was filed in 2010, and by definition, it can't
8 make claims for anything that happened after the day it was
9 filed. I mean, that's obvious. Kriss II, with respect to my
10 former clients, was simply bifurcated chronologically. When we
11 met in conference with Judge Schofield, I explained that for
12 tortious acts that they can sue for that occurred after 2010,
13 they chose, through legitimate tactical reasons, to bring a
14 second action in state court for everything that happened in
15 time after that.

16 THE COURT: Which initiated with a summons without
17 complaint, correct?

18 MR. OBERLANDER: With a summons with notice, that's
19 correct, although it was a rather long notice. The gist of the
20 allegations is that the defendants - not all of them by any
21 means - but that the defendants participated in a scheme
22 whereby people who were victims of Mr. Sater and Mr. Lauria
23 back many years ago were deprived of choses in action that they
24 would have had had their cases not been concealed; and that
25 some of the defendants, the corporate entities, Bayrock, were

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1 involved in facilitating the concealment of those assets by
2 various improper means.

3 This is already on the record before Judge Schofield,
4 so I'm going to be very brief if that's all right: My former
5 clients made clear to me in April a year ago when the first
6 complaint was due to be filed because it was moved here without
7 a complaint and then it took a year to settle the issue of
8 remand, they made clear to me that they did not wish to pursue
9 any personal claims in the matter and only would pursue
10 derivative claims in the matter on the theory that the people
11 running Bayrock, who were responsible for subjecting it to
12 liability to all of the victims who were deprived of their
13 choses, have liability. That's gone because they no longer are
14 suing; they're going to file under Rule 41 and as of right,
15 that's presumably gone as soon as my colleague gets to do it.

16 I hope that explains what's going on, but I just need
17 one more minute. There's every chance this will be the last
18 time I'm in here anyway because I don't know what they're going
19 to want to do in terms of class or what, but left by itself,
20 that case theoretically - there's solid Second Circuit
21 precedent on it - has to be consolidated into the one that was
22 brought against Mr. Sater and Mr. Lauria that's currently in
23 the Second Circuit, because technically if that case in the
24 Second Circuit is re-enlivened and remanded back, then you're
25 going to have two somewhat similar cases. They're not similar

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1 enough that *res judicata*/collateral estoppel would apply under
2 any circumstances, but there's a colorable argument.

3 THE COURT: The case in the Second Circuit --

4 MR. OBERLANDER: In the Second Circuit, the victims,
5 my clients are suing in RICO for what was stolen from them in
6 1996 and '97 by the original --

7 THE COURT: Who was that case before, the district
8 court judge?

9 MR. OBERLANDER: Judge Schofield. All I'm doing as a
10 courtesy to the Court, and I don't mean to confuse anybody, but
11 I'm alerting the Court to the possibility that it may require
12 by precedent, and I will be letting the Second Circuit know
13 immediately now that my clients have withdrawn, that there's a
14 mandatory -- not sure, the one that starts with a "C," my mind
15 just froze, not when there's a joinder -- that consolidation
16 may be mandatory.

17 THE COURT: The short is answer is, I don't have to
18 worry about that today.

19 MR. OBERLANDER: You don't have to worry with two days
20 ex Passover and then another one coming up, so I promise you,
21 this will all be dealt with in expedient time.

22 THE COURT: Yes.

23 MR. BEYS: Respectfully, you might have to worry about
24 it today because there is a way to simplify this. And to
25 unconfuse the matter, and this is deliberate obfuscation by

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1 counsel, there have been three matters brought between 2010 and
2 2013. There's Kriss I; there is this matter that
3 Mr. Oberlander refuses to name, the Gottdiener action, which
4 was brought in the name of deceased plaintiffs about facts that
5 are alleged to have happened 21 years ago and more, okay, that
6 are clearly time-barred, that Judge Schofield has dismissed and
7 denied reconsideration that is now pending before the Second
8 Circuit, and if I may be so bold, isn't coming back, okay; and
9 Kriss II, which was an amalgamation of those two, of Kriss I
10 and Gottdiener. With the Kriss I plaintiffs leaving Kriss II
11 and Gottdiener having been dismissed, there is no Kriss II. We
12 can save everyone a lot of time and aggravation and my client
13 some words stronger than aggravation.

14 THE COURT: I think you're probably right, but I'm
15 going to await Mr. Oberlander's letter in a week or so that
16 tells me his position on Kriss II.

17 Gottdiener, if it's going to die in the Second Circuit
18 as you predict, then becomes a nonissue it seems to me in terms
19 of consolidating with anything.

20 MR. WOLF: For clarity, because you asked
21 Mr. Oberlander who his clients are, he didn't give one name to
22 your answer. The docket sheet on Kriss II indicates, beyond
23 Jody Kriss and Ejekam, one, two, three, four, five, six, seven,
24 eight different names: Bayrock Group LLC, Bayrock Spring
25 Street LLC, Bayrock Whitestone LLC, Bayrock Camelback LLC,

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1 Estate of Ernest Gottdiener, the Estate of Judit Gottdiener,
2 Ervin Tausky and Suan Investments.

3 Who are the clients he's talking about? Let him give
4 their names so we can dismiss the others today, and let's at
5 least know. Talking about obfuscation? He didn't name one
6 person in answer to your question.

7 THE COURT: Assuming that somebody has standing to
8 bring -- there has to be a client for Mr. Oberlander to
9 proceed, and the client has to be somebody who has standing to
10 bring a derivative claim. It can't be somebody who once
11 strolled by Bayrock.

12 And the fact that there are various Bayrock entities,
13 Mr. Oberlander, that are plaintiffs without somebody who has a
14 sufficient interest as a shareholder or how ever to bring a
15 derivative action, it seems to me you may be out of Kriss II as
16 well. I will await your letter, but I do expect that the
17 letter will identify specifically who you purport to represent
18 and in what capacity.

19 Yes, Mr. Oberlander.

20 MR. OBERLANDER: Somewhere around page three of Judge
21 Schofield's reconsideration and her opinion on the Gottdiener
22 case, and I apologize for this, but I counted three times in
23 the three -- I don't sit quiet. The Gottdiener case was
24 dismissed on failure-to-state-a-claim grounds on grounds that
25 aren't really relevant here. There never was a reference.

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1 However, one of the grounds on which it was dismissed was that
2 with respect to Mr. Lauria, and only Mr. Lauria, time had run
3 out; and without going into the legal argument, when I moved to
4 reconsider, Judge Schofield said, if I may be casual, you know,
5 you're right, I got that one wrong, sorry, I revoke or whatever
6 the language is.

7 THE COURT: Let me interrupt you for a second because
8 I have two observations. First, Gottdiener, for some reason,
9 was never referred to me as far as I know. I think you just
10 said that. Secondly, it's up in the Second Circuit, so I don't
11 think there's much point in debating Gottdiener until we see
12 what the Second Circuit does, and there's no point in debating
13 it with me unless Judge Schofield refers it to me.

14 MR. OBERLANDER: I apologize. I'm not debating it.
15 I'm asking for the record that his remarks be stricken and he
16 be orally reprimanded for mischaracterizing that it is not out
17 of time, and Judge Schofield held it timely as to Mr. Sater and
18 not untimely pending factual development as to Mr. Lauria.

19 I would also like to point out for the record to save
20 everybody time, I was long ago retained in a very complicated,
21 written, long multiparty engagement letter with conflicts
22 waivers and so on by the Estate of Ernest Gottdiener, the
23 Estate of Judit Gottdiener, by Rabbi Ervin Tausky and by Suan
24 Investments, and I have never maintained otherwise.

25 Finally, when Kriss II was captioned, it's captioned

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1 the way it is because it is the custom and practice that when a
2 derivative action is brought, that the nominal entities for
3 whom the relief is sought get listed as nominal plaintiffs as
4 well as defendants. So any idea that I don't know, care or
5 whatever is just typical *ad hominum* -- you know what I'm
6 saying, and I would appreciate --

7 THE COURT: I appreciate what you're spreading on the
8 record, but it doesn't really move the ball forward. And to
9 the extent that there was a request to strike part of the
10 record, that request is denied.

11 I think we're at a stage now, Mr. Simon, where I need
12 to turn back to you.

13 MR. SIMON: Sure.

14 THE COURT: We're many years into this collective
15 venture and we don't yet have a complaint that can be judged if
16 I grant the relief you request, which is to file yet another
17 complaint, which also raises the issue that counsel on the
18 other side have talked about in terms of the so-called
19 purloined documents.

20 MR. SIMON: Right. Let me address first the request
21 for an amended complaint. Judge, I sent a letter to Judge
22 Schofield when I was retained letting her know, and letting you
23 know as well, your Honor, that I represented that my clients
24 really want to move forward in a new direction, and they
25 understood that there was a lot that took place that caused the

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1 displeasure of both Courts. So I have been retained really for
2 that purpose, to really pledge to the Court that my clients
3 want to move this in an honorable fashion expeditiously.

4 When I made the request for the amended complaint, I
5 was somewhat surprised by the reaction because I can assure
6 defendants that it's not being made to get some sort of
7 tactical advantage; it's really just to simplify things.

8 THE COURT: I confess, individual paragraphs I
9 understand; portions I understand, but I certainly don't claim
10 to ever have fully understood Mr. Oberlander's complaint.

11 MR. SIMON: That's exactly what I was going to say
12 next, your Honor. I've read it, too, and with no disrespect to
13 Mr. Oberlander, I don't understand 80 percent of it. So I
14 know, and this is in consultation with my clients, that our
15 intent is simply to eliminate a vast portion of that complaint
16 to -- there are defendants in here that we believe, my clients
17 and I believe, shouldn't be in there, and we want to streamline
18 this. And it's not for getting at some sort of tactical
19 advantage.

20 I think everybody will be pleased if we have some time
21 to put together a streamlined, short, concise, clear complaint
22 that sets forth the allegations in a clear, understandable
23 fashion. We also have Judge Schofield's order to undertake
24 major redactions, which my clients have no objection to and are
25 in favor of, but I just want to emphasize --

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1 THE COURT: When you say "major redactions," you're
2 referring to not using the documents that Mr. Oberlander
3 obtained from Mr. Bernstein?

4 MR. SIMON: Correct.

5 THE COURT: Implicit in that is that you've never seen
6 those.

7 MR. SIMON: No, no, I have not.

8 I just want to impress upon the Court and all parties
9 that we're simply trying to clean things up, to offer a clear,
10 concise document that will expeditiously allow everyone to move
11 forward, because the complaint in its current fashion I don't
12 think really helps anyone. So, that's all we're intending to
13 do, your Honor.

14 THE COURT: Without prejudice to what ultimately it
15 might say, can you give me and defense counsel a preview of
16 what the basic claims would be? Obviously, you've been
17 retained to prosecute some theory. Just in a nutshell, if you
18 can give me what the theory is.

19 MR. SIMON: Your Honor, when you take out a lot of the
20 narrative in that complaint, it's really a case -- you know,
21 I'm still trying to get my arms around it, so I don't want to
22 say too much, your Honor, but there's just a lot that should be
23 simplified is what I should say. We're not trying to add new
24 things or prejudice the parties in any way. I actually see
25 this as a beneficial thing, so I'm sort of surprised by the

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1 reaction.

2 THE COURT: Mr. Saurack.

3 MR. SAURACK: Your Honor knows the history of this
4 case. Unfortunately, as Judge Schofield said, there was
5 vexatious defiance of court orders that my client had to
6 litigate for five years as a result of these purloined
7 documents being in the complaint.

8 Our concern is that new counsel just can't just walk
9 in and erase what happened, especially because the complaint
10 was based upon these materials. Just to give us a complaint
11 that says the same thing in a conclusory fashion doesn't really
12 fix it, especially in light of what your Honor said in your
13 order, which was I recognize striking the paragraphs
14 quote/unquote may leave significant factual gaps in the FAC,
15 the first amended complaint. So we have a real concern about
16 that.

17 I think that the appropriate step would be for them to
18 file the amended complaint with redactions. If they wanted to
19 make an application to file a simplified amended complaint,
20 they can just do so, and we can decide at that point whether we
21 consented to it or not, but at this point, I may have a
22 problem. I will say also it's encouraging that counsel is
23 representing he's not looked at the purloined information
24 because that was another concern of mine, because then we wind
25 up with a situation where we may have to seek disqualification

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1 again.

2 One thing that ties into all of this, and I suggest
3 counsel take a look at, there's a complaint that was filed in
4 Delaware Chancery Court back five years ago before Judge
5 Strine. I think that's the complaint that probably he intends
6 to submit now, a streamlined version of the complaint that now
7 has all the privilege allegations in it.

8 For the Court's convenience and counsel's convenience,
9 I have a transcript of what was argued before Judge Strine.
10 And what was argued was that this case should be arbitrated, a
11 case that, in all likelihood, now is before the Court in what
12 he's talking about. It's our view that we think we probably
13 would argue collateral estoppel that this case should be
14 arbitrated as to arbitrability and also --

15 THE COURT: Arbitrated because it makes business sense
16 or because someplace there's an arbitration clause?

17 MR. SAURACK: There's an arbitration clause in
18 Mr. Kriss' agreement. In this case, it was a derivative --

19 THE COURT: You said Mr. Kriss' agreement?

20 MR. SAURACK: Right.

21 MR. WOLF: It was an employment case. The Court
22 viewed it as an employment case.

23 THE COURT: Okay.

24 MR. SAURACK: I have a copy of the transcript.
25 There's an arbitration provision in Mr. Kriss' agreement with

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1 the company. Mr. Oberlander was before the Chancery Court
2 before Judge Strine. Bayrock moved to compel arbitration. The
3 Delaware court dismissed without prejudice and said go
4 arbitrate; Judge Strine says it multiple times. And then the
5 case took on a life of its own in the Southern District with
6 the inclusion of all these materials that we say were
7 purloined, and now we're kind of back again where we were
8 before. And this case should be arbitrated, at least as to
9 arbitrability is what Judge Strine said. And I think Judge
10 Strine also would find, and we would argue, there is no
11 derivative case because their clients have no standing to make
12 a derivative case; that they're not members. That would be our
13 position.

14 THE COURT: There are a couple of thoughts there.
15 First, just from your facial expressions, I have a sense that
16 perhaps you're not fully familiar with the Delaware Chancery
17 Court proceeding, Mr. Simon.

18 MR. SIMON: No. This is the first I've heard of it,
19 your Honor.

20 THE COURT: Okay. I think what makes sense here is
21 for, Mr. Simon, if he wishes, to draft a second amended
22 complaint, I think you should furnish him or point him in the
23 direction of the materials that relate to the Delaware Chancery
24 Court's rulings; and presumably if he's convinced that the
25 ultimate result is going to be an order that dismisses so that

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1 an arbitral panel can decide whether this is something that
2 should be arbitrated or some other possibility along those
3 lines, he'll let us know that.

4 To the extent that he disagrees that this should be
5 arbitrated and wishes to pursue the complaint, I don't disagree
6 with you that matter which he's learned from the face of the
7 second amended, I guess it was, complaint may raise issues, but
8 I think the logical starting point is to look at Mr. Simon's
9 pleading and then see what, if anything, needs to be stricken
10 based upon the ruling and recommendation that I made that Judge
11 Schofield has adopted.

12 MR. SAURACK: We would be willing to do that
13 informally if Mr. Simon presents us --

14 THE COURT: Yes. I was about to say that I would hope
15 the two sides would have discussions about that before it
16 actually comes to court.

17 MR. SAURACK: Then if we have a problem with it, we
18 might resort to motion practice, but, again, I'll hand him
19 right now a copy of the transcript from Delaware.

20 There's one other item that dovetails here, and
21 hopefully it's a sign of good faith, especially since counsel
22 said he hasn't reviewed the purloined materials, one of the
23 last pieces here is we want those materials back. In your
24 Honor's order, your Honor said that the Court had inherent
25 powers - and we've made this application already - to order the

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1 return of those documents. And I think as a sign of good
2 faith, if they would return those documents to us, we'll
3 certainly hold onto them and maintain them during the course of
4 any litigation. That would move the ball forward as well, and
5 then we don't have to litigate that issue of the return of the
6 documents. Although, I think it's already *sub judice* because
7 we briefed it before the Court and your Honor withheld decision
8 until you decided essentially what wound up being the sanctions
9 order.

10 MR. SIMON: Your Honor, I don't know anything about
11 the purloined documents. Perhaps counsel can tell me what they
12 are and where they are because I don't have them.

13 MR. SAURACK: I think predecessor counsel, who I'm
14 sure will cooperate in giving him the files, I'm assuming
15 there's no lien, he'll give him the materials. And I would ask
16 that they be provided to us. I'll represent that we'll hold
17 them in escrow or hold them as attorneys during the case. But
18 given that those allegations are stricken, they really don't
19 have relevance anymore to what's going on in either case.

20 THE COURT: Mr. Simon doesn't have a dog in that
21 fight. He hasn't seen them.

22 MR. SAURACK: Right.

23 THE COURT: Mr. Oberlander.

24 MR. OBERLANDER: If I can speak as *amicus* on the
25 point. I've been relieved.

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1 THE COURT: I don't know that you're *amicus* on this
2 point. You're the custodian.

3 MR. OBERLANDER: No. On the related point.

4 THE COURT: Let me just first make sure. To the
5 extent that documents were downloaded from the Bernstein hard
6 drive or the handful of paper documents he had, I'm assuming
7 that you're the person who has those these days.

8 MR. OBERLANDER: I can't speak to whoever else has
9 them. I have them and I know who got part of them from me, but
10 the bigger point is, he's one of them, my colleague here,
11 because I made clear in my responses to the Court during the
12 past year that there were some 23 paragraphs or roughly seven
13 percent of that complaint that contained what I described as
14 documents that were sourced only to Bernstein and were
15 self-authenticating because they're emails that say who wrote
16 them and when they wrote them. I'm saying to you that the
17 Court is not correctly informed. The complaint has substantial
18 numbers of documents from Bernstein embedded in it.

19 THE COURT: We're now in the odd circumstance where
20 you're making part of Mr. Saurack's and Mr. Beys' argument, but
21 hear me out for a second.

22 Did you provide copies of any of the Bernstein
23 documents, so-called, to Kriss or Ejekam?

24 MR. OBERLANDER: I seriously doubt that I did. But
25 going back five years, I seriously doubt that I gave any to

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1 Mr. Ejekam for the simple reason that he took a much lower
2 profile. As to Mr. Kriss, I need to correct a misapprehension;
3 it's a very simple one. What you refer to as purloined
4 documents were not merely, I presume, documents that were
5 copied off that disk. There's a set of documents, which maybe
6 came from the disk, frankly, I don't know, in which he sent me,
7 Mr. Bernstein, and copied his lawyer and various other lawyers
8 of five or six weeks every other day before I went anywhere
9 near that disk. Therefore, in the interest of fair play, I
10 want the Court to understand that in the set of all documents I
11 got from Mr. Bernstein, quite a number of them came in as email
12 attachments from him. And I will certainly be able to check
13 and see, but I would not be surprised if some of them were sent
14 to Mr. Kriss with a note that said you ought to take a look at
15 this and so on.

16 The short version is yes, there's no question
17 Mr. Kriss saw some of them; obviously, not all of them by any
18 means. But, again, I apologize, the purloined documents, if
19 you will, although I don't agree that they're purloined, --

20 THE COURT: Let's call them the Bernstein documents.

21 MR. OBERLANDER: The Bernstein documents I would say,
22 if I had to guess, Kriss saw maybe 50, of which 25 are the ones
23 embedded right into the complaint, which he obviously saw
24 because he signed it and verified it; and 25 probably went to
25 him by email in January 2010. That's the best I can tell right

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1 now.

2 THE COURT: Those that are in the complaint, there's
3 not much I can do about that.

4 MR. OBERLANDER: They're color-coded orange and
5 yellow.

6 THE COURT: But Mr. Simon, to the extent that
7 Mr. Kriss or Mr. Ejekam have documents that came from
8 Bernstein, I'm going to direct that you return them to
9 Mr. Saurack, obviously without reviewing them.

10 MR. SIMON: That's fine, your Honor. I'll make that
11 inquiry.

12 THE COURT: Then we get to the documents that are in
13 your possession, Mr. Oberlander. What's your position on that?

14 MR. OBERLANDER: My position is that while the matter
15 is *sub judice* and our serious concerns with it, I have no
16 problem in agreeing to with whatever certification is
17 necessary, 1001, 1746, whatever, making a complete set of the
18 universe that I have. I don't have anything physical anymore.
19 I never keep physical copies pretty much, but everything I have
20 is electronic.

21 I will certainly turn over a complete documented set
22 of everything he gave me. I think I can do it in exactly the
23 format because I made a little copy at the time and I think
24 it's preserved in Cloud storage, so I will turn them over to my
25 colleague.

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1 THE COURT: They're not asking for a courtesy copy.
2 They want, in effect, the originals. I understand that they're
3 in electronic format, and perhaps in the Cloud, but more
4 pointedly, correct me if I'm wrong, Mr. Saurack, they don't
5 want you to have a copy.

6 MR. OBERLANDER: Well, I don't mean this even
7 remotely, please don't take this as flippant, it's not flippant
8 answer, but Mr. Saurack is absolutely free at any time to bring
9 a plenary action and sue. I'm not being difficult. I haven't
10 disseminated them throughout this entire point. I'm simply
11 saying that if Mr. Saurack wants them back, I understand --
12 you've got to forgive me because we're dealing with ethical
13 issues about clients, and I don't want to make an argument off
14 the top of my head and be hung with it.

15 THE COURT: Let me interrupt you for a second and tell
16 you what I think is probably appropriate, which is that in
17 electronic form, in a format that's capable of doing what I'm
18 about to say, they be provided to the Court and that the Court
19 place them under seal, so that if there are avenues you wish to
20 pursue, and while we still have ambiguities about Kriss II or
21 whatever else may be there at the periphery, that which you
22 have doesn't disappear, but it resolves defense counsel's
23 concerns.

24 MR. OBERLANDER: I'm perfectly happy to be
25 cooperative, but the reason that this is a problem to stand

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1 here and do this is it's unfair to colleagues because Mr. Simon
2 probably doesn't know, and he can't know everything in a month,
3 that the engagement letter I have with Mr. Kriss and Mr. Ejekam
4 who were my clients and all of them, everybody separately
5 represented, provides the complete rights to mutual disclosure
6 and use of everybody's work product, including all those
7 documents. So it's not a matter of just, gee, I'd like to hang
8 onto them; it's a matter of Mr. Kriss and my other client
9 Mr. Ejekam having expressly consented two years ago to transfer
10 whatever rights of use of the documents they have and share it
11 with the Gottdieners because of the joint litigation privilege.
12 I'm happy to turn them in.

13 THE COURT: A while ago you told me you seriously
14 doubted -- I thought you said -- well, as to Mr. Ejekam, you
15 said you seriously doubt that you gave the copies of these
16 documents.

17 Did I misunderstand?

18 MR. OBERLANDER: No, and I'm sorry if I confused the
19 Court.

20 To the best of my recollection, Mr. Ejekam would not
21 have seen more than one or two, other than the ones embedded in
22 the complaint. Mr. Kriss has probably seen --

23 THE COURT: And that I dealt with by directing
24 Mr. Simon to return them.

25 MR. OBERLANDER: Right. And Mr. Kriss has probably

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1 seen 20 or 30.

2 THE COURT: I understand you have mutual sharing
3 arrangements or whatever.

4 MR. OBERLANDER: That's all I'm saying: I'd be
5 delighted to turn the documents in to the Court and represent
6 that this is it, the whole set. And if the Court issues an
7 order placing them under seal, as long as I'm allowed to be
8 heard on that, even if it's perfunctory, it's well within the
9 Court's inherent powers to place things under seal, assuming
10 the requirements of process are served.

11 I'm not being difficult about that at all; I'm just
12 not going to trounce my current clients' rights to the extent
13 they're cognizable by destroying them, but I will certainly
14 turn them in to the Court.

15 THE COURT: Did you two need to confer for a second?

16 MR. OBERLANDER: No. When I appear before your Honor,
17 frankly, it's difficult. I do speak a lot. I don't want to
18 get into legal argument and citation, but the matter is under
19 review. I'm just explaining --

20 THE COURT: Wait. Let's just try to focus this
21 discussion for a second.

22 What I'm going to do is direct that you produce to the
23 Court by a date certain in electronic form, if that's the only
24 form in which it exists, all of the material that you obtained
25 from Mr. Bernstein or his counsel and, obviously, any written

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1 materials that came from Bernstein, with that material to be
2 placed under seal by the Court and that you retain no copies of
3 any such information.

4 MR. BEYS: Judge --

5 THE COURT: Time out.

6 Understood? And that's without prejudice to whatever
7 it is you may wish to pursue in that area.

8 MR. OBERLANDER: If that's an order, then I have
9 nothing to say; however, I must record an objection. May I do
10 that or do you want an informal written paper or what? I'd
11 like the right to be heard on that. I don't want to take up
12 the Court's time in chambers or in court if I can do it in --

13 THE COURT: I'm going to enter that order.

14 Yes.

15 MR. BEYS: I really need to be heard. This is beyond
16 a dishonest misrepresentation.

17 For five years, this is what we've been litigating in
18 the Eastern District of New York. It is not *sub judice*. Judge
19 Glasser in 2010 ordered the return of the documents. The
20 Second Circuit in 2011 affirmed. The Second Circuit appointed
21 Judge Cogan to ensure compliance. On April 1, 2011, Judge
22 Cogan ordered Mr. Oberlander to return hard copies and
23 electronic copies on pain of spending a weekend in jail. They
24 took it up to the Supreme Court. The Supreme Court denied
25 cert. Then they appealed another order of Judge Glasser on

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1 these very issues. The Second Circuit affirmed. The Supreme
2 Court denied cert. If your Honor issues that order,
3 respectfully, you will extend this circus of a litigation,
4 which is what Mr. Oberlander wants, for another five years.
5 There is nothing to return anymore.

6 And just so Mr. Simon, who is a former Eastern
7 District prosecutor, knows what's at stake because he is coming
8 in as a white knight and he could short-circuit this process,
9 the documents at issue are a cooperation agreement, two proffer
10 agreements, and a presentence report of one of the defendants
11 in this case, okay, somebody who cooperated with the government
12 for a period of 11 years so that he could be killed, okay, and
13 they publicly filed them in Kriss I. The whole point is, this
14 the reason why Mr. Oberlander and Mr. Lerner are under criminal
15 investigation.

16 THE COURT: Time out. That's not, as I understand it,
17 the universe of documents. That's the universe of documents
18 that concerns Mr. Sater. But Mr. Saurack - and that was the
19 whole point of the exercise that we went through that led to my
20 report and recommendation - contended that there were numerous
21 other documents that were Bayrock's attorney-client privilege
22 documents. And it seems to me neither Bayrock nor Mr. Sater is
23 prejudiced by my directive that these documents be placed under
24 seal. Mr. Oberlander said he also wants to be heard about
25 this.

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1 I don't know that there's anything at this juncture,
2 Mr. Oberlander, that merits further discussion for the reasons
3 that Mr. Beys was outlining.

4 MR. OBERLANDER: I'm sorry.

5 THE COURT: Time out.

6 I'm not going to do the work of Judge Cogan or Judge
7 Glasser or anybody else in the Eastern District, but I don't
8 think that what I'm directing really is an affront to what they
9 have directed, although, I understand it's somewhat
10 inconsistent, but I think step one is to ensure that
11 Mr. Oberlander doesn't have the documents. And I heard him
12 consent to turning those documents over to the Court, so I am
13 going to so direct within two weeks, Mr. Oberlander.

14 MR. OBERLANDER: Respectfully, I consented to turning
15 them over; I don't consent to destroying them. I am
16 obviously -- well, not obviously --

17 THE COURT: Wait. Let me make clear what I was
18 ordering, which was that you are not to retain a copy in any
19 form.

20 MR. OBERLANDER: And I understand that, and I'm
21 requesting that I understand why I may not be heard on what, to
22 be respectful, is something beyond your authority, inherent or
23 otherwise. There is solid Second Circuit precedent on that.
24 I'm respectfully telling you I have no intention of violating
25 your orders, but I'd like to be heard.

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1 THE COURT: I'm going to so order. And within that
2 same two-week period, you may make a written submission to me
3 as to why you believe the material should not be maintained
4 under seal or why my order is erroneous, and I will consider
5 that. I will not require the defendants to submit any papers
6 with respect to that until I have had an opportunity to
7 consider what Mr. Oberlander says.

8 MR. OBERLANDER: I have a question, though, and the
9 last time I didn't ask a question, I got in trouble.

10 THE COURT: Yes.

11 MR. OBERLANDER: You were just told that four
12 different judges ruled that they be returned. It should be
13 obvious that not one judge ruled anything about Bayrock's
14 documents as opposed to the --

15 THE COURT: -- Sater documents.

16 But just to be clear, I'm directing that the Bernstein
17 documents --

18 MR. OBERLANDER: I understand your Honor's order. I
19 also understand that you've just heard an absolute fraud, and
20 I'm entitled --

21 THE COURT: I don't want to get into a debate about
22 that. If there are issues you wish to raise, you can do that
23 in writing.

24 MR. OBERLANDER: To be clear, you're not accepting as
25 the law of any case that there ever was such an order? I just

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1 need to be clear on that.

2 THE COURT: Look, there either was or wasn't. This is
3 not the forum or certainly not the time to discuss that.

4 Mr. Simon, how long do you need for the proposed
5 second amended complaint?

6 MR. SIMON: Your Honor, can I just address that for a
7 minute. As I understood your ruling, you wanted me to front it
8 first with the defense before submitting it to the Court?

9 THE COURT: Well, there is the issue of what the
10 defendant said, which is that your clients should not benefit
11 from a new attorney coming in in the sense of perhaps
12 inadvertently using material that should not be part of the
13 complaint. Numerous paragraphs have been stricken from the
14 complaint. And I think you and Mr. Saurack need to have a
15 discussion. Once you get to the stage of a proposed amended
16 complaint, I think it would be useful for the two of you to
17 talk about that proposed amended complaint before it's filed
18 with the Court. That's all I'm saying.

19 MR. SIMON: Right. Obviously, I have to study your
20 order and Judge Schofield's order as to what has to be
21 redacted. To that extent, I have to look at matters that
22 counsel claims I shouldn't be looking at. So, if I understand
23 what they're talking about --

24 THE COURT: Yes, and that's a difficult issue that you
25 have to confront.

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1 MR. SIMON: Right. It's already in the body of the
2 current complaint, so in order to eliminate those sections, I
3 have to review them.

4 THE COURT: I think that's right.

5 MR. SIMON: Right.

6 THE COURT: But I think you and Mr. Saurack, perhaps
7 after this conference, should sit down and talk about that.

8 MR. SIMON: Right. I certainly will have discussions
9 with Mr. Saurack, but I would prefer to submit my proposed
10 complaint to the Court and then we can have a discussion,
11 because from what I gather, counsel is opposed to any kind of
12 new complaint. I think I'm going to get resistance.

13 THE COURT: He is, but there were several letters
14 saying, well, the solution here is not just to redact the
15 complaint; the solution is to dismiss the complaint. And
16 neither I, nor, to my knowledge, Judge Schofield has accepted
17 that, so that argument is a nonstarter.

18 MR. SIMON: Right.

19 THE COURT: If you had not come into the case, what
20 would happen next is a redacted version of the complaint
21 presumably would be the subject of a motion to dismiss. And
22 since we don't know what content your complaint will have, I
23 think you should draft it -- I'm not going to direct, just to
24 make matters easier, that you provide it to Mr. Saurack. I
25 think what I'll do is, tell me how long you need to prepare

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1 that complaint. And then what I'll do is I'll schedule either
2 an in-person conference or a phone conference so we can discuss
3 how to proceed next.

4 MR. SIMON: I'm not looking to delay things, but as
5 I've sat down and reviewed this matter, it's far more
6 complicated than I imagined when I first wrote to Judge
7 Schofield. I really am working hard to try to get my arms
8 around this. But I would ask the Court for 60 days to enable
9 me to really sort all this out. As I said, there are a
10 multitude of defendants that, in my view, don't even belong in
11 the case; and I just learned from counsel before the proceeding
12 today that there are other defendants who have been served who
13 aren't even listed in the complaint, if that's correct.

14 No, that's not what you're saying?

15 MR. BEYS: I never served anything.

16 MR. SIMON: Then I stand corrected, but there are a
17 host of defendants who, in my view and I believe my client's
18 view, shouldn't be in the case. It's kind of a huge
19 undertaking. And I need to sort it all out and get my arms
20 around it and come up with a document that really is workable
21 that everyone will be satisfied with that will be a clear
22 statement of the allegations, and we can move forward
23 expeditiously. I'd ask the Court for 60 days.

24 MR. WOLF: Your Honor, I'd like to say two things:
25 One is, while I appreciate Mr. Simon's candor, in his letter of

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1 March 27 to Judge Schofield, he indicated that he was
2 requesting until tomorrow to file the second amended complaint.

3 Whatever he is going to submit to the Court, and
4 apparently counsel again is not going to be able to see it, it
5 shouldn't be in 60 days or frankly even six days. He said he
6 could do it by tomorrow. Let him do it by tomorrow or give him
7 another week but 60 days? That's one thing.

8 Two is, in light of your ruling, which Judge Schofield
9 has adopted and affirmed, we're entitled to a record that once
10 the paragraphs are stricken and removed in accordance with your
11 order, whether that's a complaint or not that Mr. Simon can
12 sign under Rule 11 that would otherwise be nonfrivolous, we're
13 entitled to know whether that effectively results in a
14 dismissal or not that we can move on it and say, okay, once,
15 after years and years of litigating, they lost, they forfeited
16 the right to amend yet again, okay, because that wasn't an
17 amended pleading, therefore, the case should be dismissed.
18 We're entitled to be able to make that motion on the record,
19 not to just pretend that they get a new counsel in and then
20 none of that matters.

21 THE COURT: You can make that motion. I will permit
22 you to make that motion as part of your opposition to the
23 pleading that we're apparently going to get to at some point.

24 Mr. Saurack.

25 MR. SAURACK: I'd like to say a couple of things: One

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1 is, one of the reasons why we want to see the complaint as well
2 as we're considering it is to see if there is any of that
3 information that could be considered purloined or privileged,
4 so I think it does make sense for him to confer with us.

5 Alternatively, I suppose he could file under seal and
6 make a motion to amend. But we'll listen to him and if it has
7 no privileging materials in it, that's something we'd like to
8 know during that period. That's why I think it makes sense for
9 him to present a copy to us of what he intends to file, what he
10 intends to move to file, through motion practice.

11 THE COURT: I think probably, Mr. Simon, it makes
12 sense to file under seal and provide to Mr. Saurack and to
13 Mr. Sater as the defendant and Mr. Sater's counsel the proposed
14 version of the complaint.

15 MR. SIMON: Sure.

16 MR. SAURACK: I'm happy to do that. I just had a
17 couple of points. We can have a conference after that step has
18 taken place. I would just ask that with respect to the order
19 concerning the production of documents to the Court and the
20 destruction, that that order encompass destruction of
21 derivative products. If they have photocopied it or put it in
22 a Word document, that that also be part of the order. And if
23 their clients present any documents that were given to them, to
24 Mr. Oberlander, that those be part of the order as well, just
25 so that there's no leakage in the order.

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1 THE COURT: Yes, it will be.

2 MR. OBERLANDER: May I --

3 THE COURT: Just a minute. I'll give you until
4 May 15, Mr. Simon.

5 MR. SIMON: Your Honor, it's --

6 THE COURT: I understand it's a daunting task, but
7 there was a representation that it would be filed forthwith.

8 MR. SIMON: Judge, if I can just address that.

9 THE COURT: Yes.

10 MR. SIMON: That was three weeks ago, and at that
11 time, the clients had just asked me to undertake this, and I
12 had no idea really what I was dealing with. After looking at
13 this, I understood what a daunting task this is. I certainly
14 will work expeditiously, but that only gives me four weeks.
15 Quite frankly, I don't really, at this juncture as I sit here,
16 understand the case. I really need to get my arms around it.
17 I would implore the Court for a little more time than that.

18 THE COURT: June 5.

19 MR. SIMON: All right. Thank you.

20 MR. OBERLANDER: Your Honor, in view of I believe you
21 intend to modify the order that you're going to place on the
22 docket, I just have a couple of housekeeping things I want to
23 be clear about.

24 THE COURT: Yes.

25 MR. OBERLANDER: My cocounsel is concerned that we

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1 have made clear that we have never stipulated anything was
2 purloined, and that's why you said we'll call it the Bernstein
3 documents, okay? I didn't want to accidentally get estopped from
4 doing something.

5 The second thing is that it is correct, or I'm not
6 mistaken, that your Honor has not ruled on privilege or
7 confidentiality issues as to any of the documents that are
8 Bernstein documents or otherwise brought in issue. I mean, I'm
9 just putting that on the record and requesting confirmation
10 that nothing has ever been ruled to have been privileged or
11 not.

12 THE COURT: I don't believe I ever ruled on that
13 issue. The gist of my order striking paragraphs from the
14 complaint was that you didn't follow my instructions.

15 MR. OBERLANDER: I understand, and that's what Judge
16 Schofield said, too, which is that there was no resolution of
17 the issue because the sanction was based on a failure to follow
18 orders and not use or privilege or not privileged documents. I
19 mention that simply because so I can have clarification.
20 Unless I misexplained it, Mr. Kriss and Mr. Ejekam gave my
21 other joint clients full -- whatever rights they had in those
22 documents to use them as part of the joint defense agreement or
23 joint prosecution agreement that they signed. I promise, it's
24 very simple. I'm trying to understand.

25 THE COURT: Let me try to understand or make this

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1 clear: I understand what you said about the agreements,
2 although I fail to understand the relevance of it, but if I
3 find out that between now and the date that they're to be
4 turned over to the Court to be placed under seal that, relying
5 on those agreements, you have turned over copies of those
6 documents to your other clients, I will most assuredly see that
7 an arrest warrant is issued for you and you will remain in jail
8 until those documents are clawed back.

9 Do we understand each other?

10 MR. OBERLANDER: We do.

11 Now, may I please understand under what legal theory
12 you're ordering me a return and destruction since there has
13 been no ruling that they're improper, purloined or privileged?
14 You ordered me to destroy all my copies. How do I represent my
15 clients? And you've ordered derivative products --

16 THE COURT: Sir, I didn't order you to destroy
17 anything. I ordered you to submit it to the Court to be placed
18 under seal. I presume that you may have, for example,
19 annotated a document electronically. The annotated copy, not
20 just the original, is to be turned over. Obviously, once you
21 have created an electronic copy to be tendered to the Court,
22 you will have to destroy it, the original, so to speak, that's
23 on your hard drive or in the Cloud, but all of this is being
24 preserved in electronic form. Nothing is being destroyed.

25 MR. OBERLANDER: But you're ordering me to destroy my

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1 copies eliminating my right to use them, and I'm asking you on
2 what legal basis.

3 THE COURT: The legal basis is that I'm a judge of
4 this court and I've just so directed. And if you disagree with
5 that, you have your remedies, sir.

6 MR. OBERLANDER: So there's been no finding of fact?

7 MR. SAURACK: Let me interrupt. The Court has already
8 found in its decision that it has inherent powers to do what it
9 is doing. It's in your written decision.

10 THE COURT: I'm not going to debate the point. It is
11 accurate, however, to say that the basis for redaction in my
12 report and recommendation was not a finding with respect to
13 privilege or work product; it was based upon expedience of my
14 directives for failure to comply with my directives, which is
15 not to say that a finding that all or some of the materials are
16 privilege or work product or otherwise proprietary. It's not a
17 finding that somebody could make. Obviously, there have been
18 directives issued by judges in the Eastern District.

19 MR. WOLF: For these proceedings, since Mr. Simon now
20 represents Mr. Kriss and Mr. Ejekam, that order is extended,
21 and I'm sure he will assure compliance, that Mr. Kriss and
22 Ejekam themselves, if they do possess any of those documents in
23 any form, that they will of course comply as the Court has
24 directed.

25 MR. SIMON: I have already indicated that I'm going to

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1 make an inquiry to them.

2 THE COURT: Thank you, all.

3 MR. WOLF: Two other things, please.

4 THE COURT: I gave Mr. Simon until June 5.

5 MR. WOLF: We ask for no further extensions either
6 with that June 5 date.

7 THE COURT: What's the point of asking for no further
8 extensions when there hasn't been a request for any extension?

9 MR. WOLF: Fine. It sits on counsel's mind when the
10 Court says no further extensions.

11 THE COURT: I'm not going to deal with issues that are
12 not before me, although this case seems to invite such
13 discussions.

14 We will have a phone conference June 8 at 2:00 p.m.
15 Actually, that's probably a little sooner since you'll need
16 some time to review the pleading. We'll make it June 15 at
17 3:00 p.m.

18 MR. SAURACK: One note. I'm assuming it's the case
19 they're not going to do this, but, obviously, until they have
20 taken the steps to provide the materials to the Court and
21 destroy materials, that there would be nondissemination. Your
22 Honor previously ordered nondissemination. And it goes without
23 saying that --

24 THE COURT: Did you miss the part where I talked about
25 an arrest warrant and jail?

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1 MR. SAURACK: Right. I got it.

2 MR. WOLF: I want to address now the proceedings or
3 the procedure going forward in the Kriss II 2013 matter that we
4 haven't addressed today.

5 THE COURT: Mr. Oberlander is going to send me a
6 letter within a week --

7 MR. OBERLANDER: May I please have two weeks.

8 THE COURT: -- within two weeks and set forth his
9 position as to who, if anyone, he represents in Kriss II; and
10 based upon what he says, I'll do something, but since I don't
11 know what he's going to say, I don't know what I'm going to do.

12 MR. WOLF: Understood.

13 THE COURT: I certainly would welcome letters from you
14 in response to his letter suggesting courses of action.

15 MR. WOLF: My point is, of course, as the Court is
16 aware, there's an amended complaint under seal that we have
17 never seen in Kriss II and albeit I assume it contains Kriss I
18 material that should be redacted, and it should be, but that
19 was per Judge Schofield's order. This is your one and only
20 amended complaint in this case. Either file it or stand on
21 your first complaint. Whatever may be left of that relics or
22 perhaps there won't be a case and it's all moot, I certainly
23 hope.

24 THE COURT: As I said, I don't want to deal with
25 issues in the abstract. Until I get Mr. Oberlander's letter,

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1 I'm not going to worry about that.

2 MR. WOLF: Thank you.

3 THE COURT: Thank you, all.

4 (Adjourned)